Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-1510

RAYMOND W. GRABER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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TABLE OF CONTENTS

Page

Appendix A — Findings of Judge Dooling 1a

Appendix B — Oral Opinion of the District Court 24a

Appendix C — Judgment of the United States Court of Appeals 30a

APPENDIX A — FINDINGS OF JUDGE DOOLING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

RAYMOND GRABER,

Defendant.

75 CR 166

SPECIAL FINDINGS OF FACTS AND GENERAL FINDINGS

Appearances:

JOHN CADEN, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for the Government

JOHN JOSEPH SUTTER, Esq. for the defendant

DOOLING, D.J.

In response to allegations of the existence of a corrupt political contribution system in Nassau County the United States Attorney for the Eastern District of New York initiated an investigation, and, in connection with the investigation, a Special Grand Jury was duly impanelled in January 1975 to conduct an inquiry into the charges of a corrupt political contribution system in Nassau County (Rule 6(a), (g), Federal Rules of Criminal Procedure). Specifically, the inquiry was directed to determining whether there was or was not prevalent in Nassau County public offices a system under which employees

Appendix A

were expected and required to pay 1% of their annual pay to committees of the Republican Party, whether such a system of contributions, if it existed, was voluntary or was brought about by coercion, and whether any violations of federal law were involved. The federal statutes in contemplation were the penal sections of the Civil Rights Act, 18 U.S.C. 241 and 242 and the Hobbs Act, 18 U.S.C. 1951 which, among other things, proscribes affecting commerce or the movement of any articles in commerce by extortion or conspiracy to do so. The investigation continued from January 1975 into the year 1976. In the course of it federal investigators conducted some 1500 interviews, from 300 to 400 witnesses were called in, and their testimony was presented to the Grand Jury.

Witnesses before the Grand Jury gave testimony which indicated that the Department of Conservation and Waterways of the Town of Hempstead was an office in which 1% contributions were given to the Republican Finance Committee of the Town of Hempstead; in that connection there was testimony that indicated that defendant was involved as a solicitor, collector or transmitter of 1% contributions. The defendant was accordingly subpoenaed to appear before the Grand Jury and did appear before the Grand Jury on July 11, 1975.

No substantive indictments have resulted from the Grand Jury investigation of the 1% system that was alleged to have prevailed in Nassau County public offices, but the progress of the investigation and of the Grand Jury inquiry was regularly reported to the Civil Rights Division of the Department of Justice in Washington and minutes of the Grand Jury proceedings were sent to Washington periodically for its consideration. The only indictments which have resulted from the Grand Jury investigation have been perjury indictments.

Appendix A

The defendant appeared before the January 1975 Special Grand Jury on July 11, 1975 at about 11:00 in the morning. A number of other persons had been subpoenaed to testify before the Grand Jury on the same morning and the defendant may well have derived from the circumstances an impression that the Assistant United States Attorney was pressed for time and that defendant would be expected to testify quickly.

The transcript of the Grand Jury testimony of the defendant is an accurate transcript of the questions asked of defendant and the answers he gave during his interrogation before the Grand Jury. The defendant was duly sworn by the foreman of the Grand Jury. The Assistant United States Attorney, after asking the defendant whether or not he was employed by the Town of Hempstead and ascertaining that he had for nearly two years been Deputy Commissioner of the Department of Conservation and Waterways, advised the defendant that the Grand Jury was looking into allegations that Town of Hempstead employees had been coerced into giving portions of their salaries each year to the Republican Party. He was advised further that there had been "a fair amount of testimony" about the defendant's participation in the one percent scheme.

The Assistant then advised the defendant that he had a right to refuse to answer any questions the answers to which might tend to incriminate him, that anything he did say could be used against him in court at a later time, that he had a right to have an attorney of his choice to consult with outside the Grand Jury room, that he could consult with that attorney at any time by simply asking the foreman, and, finally, that if he could not afford counsel the court would provide him one. The defendant asked whether this was a routine statement. The Assistant answered that it was not, that, "[i]n all candor, . . . if it is determined that there have been violations of the federal criminal statute, you might fit into the category as a defendant

rather than a witness in that there has been testimony that you have participated in the one percent thing as it is called; that you have actively solicited employees possibly pressured them and indeed, given them cards of some sort with one percent figures on them." (Tr. 3, lines 15 to 23). The Assistant explained that he did not say and it had not yet been determined whether or not such conduct was criminal but that he thought the defendant should know — and at that point the defendant interrupted. The defendant said that after Special Agent Walter Distler of the Federal Bureau of Investigation had telephoned him, he had telephoned to Republican Headquarters and confirmed that James Catterson was available as counsel.

Defendant then asked whether it was proper for Mr. Catterson to be in the jury room, saying

> "I mean you're putting it in a pretty grim light."

The Assistant United States Attorney explained that the law did not allow attorneys in the Grand Jury room but that at any point during the interrogation the witness could simply by asking go out and talk to his counsel privately. At that point the defendant stated that he did not think there would be any need for that, but

> ". . . what you just said is sort of scary."

The Assistant United States Attorney then pointed out that Mr. Catterson was outside, and that if defendant wanted to talk to him at once or any other time — but the defendant interrupted to say that he did not really think he wanted to.

Defendant was then asked whether he desired to waive his constitutional rights and to testify before the Grand Jury. Defendant answered that he would certainly testify and that no

threat or promise had been made by the Assistant United States Attorney or anyone else.

Defendant's testimony on the topic of inquiry occupies about 12 pages in the transcript (Tr. 5, line 14 to Tr. 16, line 9). He was first asked whether he had heard anything to the effect that the Town employees were expected to give one percent of their salaries to the Republican Party each year. He answered

> "No other than in the newspapers for many years. . . . Through the years, the various officials of the Party have openly admitted; its appeared in newspapers through the years, that many well, in our case since I think you can encompass more in the Town of Hempstead that many of the Town of Hempstead employees contribute and a figure is made in many cases about one percent."

His answer was somewhat further extended and he was then asked —

> "Q Did you hear anything to the effect that Town of Hempstead employees are expected to give one percent?
>
> A No. All I know is that I read in the paper. Specifically, nobody ever told me at any point that I must give one percent."

Defendant's attention was drawn to the fact that his 1974 salary was recorded as $20,159 and that his Party contribution around election time was $202. He was then asked how he had arrived at that figure. After some further questioning about the

amount of the salary and of the contribution the witness was again asked, "How did you arrive at the $202 figure?" And he said —

> "Okay, I would pinpoint it this way. As I previously stated, I joined the Town of Hempstead in late September of 1966. At that time, my department was in its inception. It was just a nucleus being formed. It was a new and imaginative, way ahead of its time concept in environmental protection."

At that point the Assistant United States Attorney interrupted the witness and said —

> "As you can see, I'm obliging you at your request here, as you can see. There's a hallway full of people out there that we are trying to get out of here by lunchtime. And if we can stick to the question, we'll be a lot better off."

The Assistant then returned to the questioning and said

> "Q You sat down in 1974 and you made out a check for $202.
>
> A Right. Good. You asked me —
>
> Q How did you arrive at this figure?
>
> A Perhaps I've been too wordy but I tried to explain it. In any event in mid-October at that time having a small office, you know, just several people, I heard *Yolanda* Rider Speranza. . . , Carl Lebek — . . . Thomas Laurencelle . . . And Gino Aiello. . . . They were all sitting around in a bull session discussing the fact that they received, I believe, a campaign finance letter and that they were all going to contribute one percent. One of the four, I do not recall which of the four, said to me 'you ought to contribute one percent too.'
>
> "Q What year was this?
>
> A This was 1966.

The defendant explained that in that year, having been unemployed for a year before he hired on, he had made only a token contribution but that in the ensuing years he had made a one percent contribution "just like every body else."

Defendant was then asked the first of the questions quoted in the indictment (Tr. 9, line 7).

> "Q All right. Now, did you play any role within your department in actively soliciting these contributions from employees under you at any time?"

The defendant's answer in substance was that he acted in each and every year after 1966 as the transmitter of contributions, but would not have been so presumptuous as to say to anyone "you should give one percent." He said, indeed, that when his secretary asked him what everyone was talking about with reference to one percent, he told her that she would have "to get that information from somebody else." He continued —

> "In other words, feeling in my position, that I should not be the originator of such a thing."

The Assistant United States Attorney then said,

> "Q All right. Let me ask you this then.
>
> A Incidentally I do not wish to commit perjury. There is a little more to that.
>
> Q All right. Hold on.
>
> A I don't want to commit perjury."

The Assistant United States Attorney then asked the second question quoted in the indictment —

> "Q A number of employees have testified that you would come around and give them a three-by-five or a similar card on which it would have their name, their salary, and a handwritten notation somewhere on the card which was a figure representing one percent of their salary. Now, first of all, has that occurred?"

The defendant answered that cards showing the employees' names and salaries were indeed prepared, but the substance of his testimony was that this was done as a convenience to employees who wanted to know what their salaries were so that they, acting on their own initiative, could figure one percent on their salary. Speaking of department employees who were not in the main office where defendant was stationed but at scattered locations, the defendant said "I rarely see them. I have no direct communication with them. I have never solicited them. Okay?" He explained that at times he gave such 3 x 5 cards as were referred to in the question to supervisors for distribution to the men working under their direction at locations outside the main

office. He said in this connection that he had received so many requests for salary data that

> ". . . I did give some to some supervisors with these instructions, so help me God! 'You have this. You've been asking for it for some. There's gonna be more. I'm too busy preparing a budget. They are only to be given to a man if he asks you a question which specifically can be answered by you.' And there was no one percent figure on those cards."

The indictment charged that the quoted testimony of the defendant, as he then well knew and believed, was not true in that

> ". . . he had suggested to Town of Hempstead employees that they should give a portion of their annual salaries to the Republican Finance Committee, and he had approached Town employees to solicit such contributions."

The Government's evidence at the trial established beyond a reasonable doubt that the defendant both had solicited, on behalf of the Town of Hempstead Republican Finance Committee, contributions equal to one percent of annual compensation and had suggested to Town of Hempstead employees that they give one percent of their annual compensation to the Republican Finance Committee of the Town of Hempstead. The evidence of the witnesses was that in August or September of each recent year before 1975 the defendant would remind them that one percent time was at hand, and that he would do this without being asked by employees whether or not they were expected to contribute or

whether or not it was time to make a contribution to the Republican Finance Committee.

The defendant, in the case of employees within the headquarters office of the department, personally approached employees and received checks from them. In the case of employees not working in the main office or headquarters, defendant would advise their respective supervisors that it was time for the employees under their supervision to be reminded that it was the time of year to make a one percent contribution. Defendant supplied to the supervisory employees lists of the employees in their locations with their annual salaries, and the evidence was that departmental employees in places outside the main office who failed to make contributions, or who had some reason for not being able to do so, were told to take the matter up with defendant.

The evidence was, and it is credible, that defendant did cause cards to be prepared for the departmental employees, each card showing the name of the employee and his annual salary, and that the cards in at least one year also had the one percent amount computed on the card. There was no evidence that the supervisory employees or any other employees had taken the initiative and had themselves asked defendant either for lists or for cards in order to serve as a convenience to those who might not recall the exact amount of their compensation (inclusive of overtime).

There was considerable credible evidence that defendant did not advise certain employees that contribution was mandatory, or say to them that a failure to contribute could affect either their hiring by the Town, their promotion, their receiving overtime, or any other expectable employment advantage that discretionary authority could deny to them. However, there was also credible

evidence that defendant told one employee who had failed to make a contribution that he would not receive overtime because of his failure to make a contribution. The employee in question took the matter up with defendant's superior, Commissioner Udell, who cancelled the prohibition of overtime; it appears that the employee lost not more than one Saturday morning's overtime. There was credible evidence also that defendant gave another employee to understand that if he wished to be reclassified to a certain advantageous compensation basis he would be expected to make a contribution. The employee then tendered a $75 money order to defendant which defendant first rejected but later accepted. After a considerable lapse of time the employee did receive the desired classification. When "one percent time" arrived later in the same year the employee contributed, in addition to the $75 already contributed, approximately one percent of his annual pay.

The evidence supports beyond a reasonable doubt the inference that defendant did advise employees to make contributions equal to one percent of their annual salary rounded to the nearest full dollar. In the case of one employee who had been solicited through her supervisor to make a one percent contribution, the employee, opposed to being expected to make any contribution at all, drew a check in an amount equal to exactly one percent of her annual salary — $81.67. After a lapse of two weeks defendant returned the check to her and told her to write a new check rounding the amount off; thereupon the employee did write and give to the defendant an $82 check.

The evidence in the case thus leaves no escape from the conclusion that the defendant was an active participant in the solicitation of one percent contributions from Town employees and in suggesting to them that their contributions should be a

portion, that is, one percent, of their annual compensation. The solicitation and suggestion was made directly to main office employees, and was made indirectly, through supervisors, to employees at locations outside the main or headquarters office.

Defendant contends that he was not given an opportunity to complete his answers but was hurried and interrupted before he had completed his answers to the questions quoted in the indictment. He contends that the answers that he gave are, upon analysis, seen to be so unresponsive and inexact that they could not form the basis of an indictment under 18 U.S.C. 1623 in the light of *Bronston v. United States*, 1973, 409 U.S. 352.

The circumstances of defendant's testifying before the Grand Jury bear directly on this question.

On June 11, 1975, one month before defendant testified before the Grand Jury he was interviewed by Special Agent Walter E. Distler of the Federal Bureau of Investigation. Mr. Distler credibly testified as follows:

> "Q Can you recall what if anything you and Mr. Graber discussed concerning employee contributions within his department?
>
> A Yes, I asked him if he knew anything about the one percent. He indicated that he did and I believe he said he heard about it through scuttlebut from employees in the office.
>
> He further indicated to me that when he first became employed with the Department of Conservation and Waterways he was requested by the Commissioner to act as a collector for any

> contributions that might be given by employees of that department.
>
> Q Did you ask him whether or not he had anything to do with the soliciting of those contributions?
>
> A Yes, I believe he did.
>
> Q What if anything did Mr. Graber say?
>
> A Mr. Graber said he had nothing to do with the soliciting of the contributions, but then he indicated to me that he did act as a collecting point for the contributions.
>
> Q Did you ask Mr. Graber whether or not he had ever solicited contributions for the Republican Party?
>
> A Yes, I believe I did and he indicated to me that as a member of the West Hempstead Republic Club which he said was a social organization he did on possibly one or two occasions go door to door soliciting contributions for the Republican Party.
>
> Q Did you ask him after he said that or did it ever come up whether or not he had ever solicited contributions from employees of the Town of Hempstead?
>
> A Yes, I think he ended that by saying that he never solicited contributions from the employees of the Town of Hempstead."

Appendix A

On cross-examination he was asked and answered the following questions:

> "Q When you get into this word "soliciting," what did you intend by that word?
>
> A Did he actually go to various employees and ask for contributions.
>
> Q He told you "No"?
>
> A That's right.
>
> Q Mr. Distler, he did tell you, though, did he not, that he would have other people that were employed by the Town go out and ask for contributions?
>
> A Not to my knowledge he didn't.
>
> Q Did you ask him if he did?
>
> A No, I did not."

Later in his cross-examination Mr. Distler testified:

> "In your interview, did you ever ask Mr. Graber whether or not he suggested to Town of Hempstead employees that they should give a portion of their annual salaries to the Republican Finance Committee?
>
> A No.

Appendix A

> Q Did you ever in your interview with Mr. Graber ask him whether or not he had approached Town employees to solicit such contributions?
>
> A No, I didn't."

In the context of the last two questions and answers the witness's answers appears to be directed to the precise verbs used — "suggested" and "approached." The witness's answers were not intended to withdraw the substance of what he had said in his direct testimony quoted above.

Defendant himself testified about his interview with Mr. Distler and the central point of his testimony was that Mr. Distler had not asked him whether he "solicited" contributions but had only asked him whether or not he had "collected" contributions. Defendant said in part

> "A The only word he used was "collect." I remember that. "Did you collect" and in order to answer him I had to define it. I said, "Mr. Disler, can you define what you mean by that? Do you mean if I actually solicited donations from individuals in my department, like one would if he went from doorbell to doorbell to doorbell in his neighborhood," meaning to each and every or virtually each and every person. Mr. Disler says "Yes, that's what I mean," and of course to that type of solicitation the answer is no and this is what I so told Mr. Disler, to that type of each and every or virtually each and every person like you do when you go down the block ringing doorbells. I have this "doorbells" and it's also in

my second discussion with Mr. Disler via telephone because then we have a somewhat different version on the second — when he called me and said that unlike the other departments —

Q I must ask you —

A I'll stop there. Okay.

In that frame of reference, my answer, after I got Mr. Disler to qualify what he meant by collect, the answer was then no.

Q You admitted to Agent Disler then that you in fact did solicit employees, co-employees, but not directly?

MR. SUTTER: Objection.

THE COURT: On what ground?

MR. SUTTER: On the basis —

THE COURT: You're arguing with him because of the word "then" in the question?

MR. SUTTER: Not only that, your Honor, but that's not the testimony of this witness.

THE COURT: I'll sustain the objection to the form of the question.

MR. SUTTER: Thank you, sir.

Q Did you tell Agent Disler that you solicited employee contributions?

A He never asked me.

Q Never asked you?

A Other than what he said, "Do you collect," I asked for a definition. By definition, going down the block, doorbell by doorbell. He said, "Yes, that's what I mean." I said, "The answer is no," and then his next question — I may have the order wrong, you know. I don't know which order, but my notes "When you're hired by the Department of Conservation Waterways, did Francis D. Purcell tell you about one percent?" I said unequivocally, "No."

Shown Special Agent Distler's memorandum of the June 11th interview (dictated from his now destroyed notes by Mr. Distler on June 17th, six days after the interview), defendant in substance said that the memorandum did not refresh his recollection of the conference and that he disputed its correctness. He then was asked and answered:

> "Q What you dispute is you being attributed as having said during the course of that interview that you had absolutely nothing to do with soliciting these contributions and that you had merely acted as a collecting point for any contribution employees may desire to give. Is that what you dispute you didn't say that?
>
> A Either soliciting or collecting, either."

Appendix A

The witness had his own "debriefing" notes of the interview which he had made on the day of the interview, and when he was asked whether another part of Mr. Distler's memorandum refreshed his recollection he referred to his own debriefing note and then answered:

> "A This was written the same time. I have no recollection of that time nor the debriefing which I made immediately of the word "solicitation" ever being used or anything other than that —
>
> • • •
>
> Q You do not recall repeating to him a second time during the course of the interview that you had never solicited contributions from employees of the Town of Hempstead?
>
> A I say on the first interview he didn't ask me that."

Defendant was amply forwarned of the questions which he was likely to be asked when he appeared before the Grand Jury. There is no real disparity between what he said to Mr. Distler and his Grand Jury testimony. Nor is there any significant disparity between his reconstruction at trial of discussion of the Distler interview and the approach to the subject of the so-called one percent system which he took in testifying before the Grand Jury.

Defendant testified that he had heard of the United States Attorney's investigation early in the year and had talked about it with his superior, Commissioner Udell, before going into the Grand Jury. He further testified that Commissioner Udell had told defendant that Udell could not get himself involved, that

Appendix A

the Commissioner could not admit that he had assigned the defendant to the matter each year and that Udell told the defendant in essence that he would be on his own. Defendant testified that Commissioner Udell had not wanted the defendant to refresh his (Udell's) recollection, that on the contrary, Udell wanted to cut off his talk with defendant altogether. Defendant said that this preyed on his mind. He was also concerned about what Commissioner Udell had said about Yolanda Speranza, Udell's secretary — or what a Gino Aiello had said — to the general effect that defendant had twisted Yolanda Speranza's arm. He was concerned also about Udell's statement that one John Zuretsky "could hang us all." Defendant had earlier heard that before he (defendant) had been employed by the Town of Hempstead, Zuretsky had been denied a promotion because he had not made a contribution. Apparently at some point Commissioner Udell had allegedly designated defendant to remind Zuretsky to make contributions in future years. Defendant testified that when he was told in the Grand Jury that he was potentially a defendant he had an impression that all of this was connected with Commissioner Udell's intrigue and the Commissioner's own earlier appearance before the Grand Jury.

Defendant testified that he had consulted with Mr. Catterson before testifying, and that Catterson had tried to give him an insight into Grand Jury functions and how to answer questions and had spotted a couple of things for him. Defendant said that Mr. Catterson had told him that it would be good to include in his testimony something in praise of his department. Defendant told the Grand Jury, referring to the year 1966,

> "At that time, my department was in its inception. It was just a nucleus being formed. It was a new and imaginative, way ahead of its time concept in environmental protection."

Defendant said that Mr. Catterson had also told him that before he explained something he should use an expression "I don't want to be hairy about this." Before the Grand Jury defendant did say in answer to the solicitation question: "I don't want to be hairy about it."

Defendant testified that he was treated roughly in the Grand Jury room, that he was questioned in an accusatory manner, and that he was not permitted to complete certain of his answers. Defendant said that he got in touch with the United States Attorney's office right after he had testified and advised them that he felt that his testimony was incomplete because he was rushed, and he asked to have the Assistant United States Attorney recall him as a witness. He later consulted Mr. Catterson, who, he testified, told him that he had a problem with the United States Attorney's office and should go to see them. He went then to the FBI and an FBI man took him in to see the Assistant United States Attorney. The Assistant United States Attorney suggested to defendant that he retain an attorney and return. Defendant did retain an attorney and returned with him to see the Assistant United States Attorney. Defendant's attorney went over the Grand Jury testimony, and in the end, after the Assistant United States Attorney had suggested that defendant go into the Grand Jury again, defendant's attorney advised the Assistant United States Attorney in defendant's presence that he did not see perjury in the transcript and therefore was advising the defendant not to go back on the witness stand. Defendant accepted that advice.

At the trial defendant was asked on cross-examination, with reference to the visit to the Assistant United States Attorney, which took place on August 8, 1975, whether he had not stated to the Assistant that the testimony he had previously furnished to the Grand Jury on July 11, 1975, was true and correct. The

defendant was unable to answer that question from his recollection but answered

> "Seeing my Grand Jury notes, I would say my Grand Jury notes are true, my Grand Jury testimony is true."

On re-direct examination the defendant in substance testified that he did tell supervisors to go about and see if they could get political contributions for the Republican Party, that he solicited many people for contributions and that he did this at the direction of the Commissioner.

Taking into account all of the evidence both relating to the period before his Grand Jury testimony and after it, as well as defendant's testimony at the trial, it is concluded that the defendant was not prevented from continuing his testimony before the Grand Jury in any manner that was improper or that resulted in the defendant's failing to convey his complete response to the questions asked. While the answers that he gave were discursive in the extreme, they dealt directly with the questions asked. In each case the answers produced, and were intended to produce, the impression that the defendant was not active in the solicitation of one percent contributions from employees of the Town of Hempstead, but was merely one who stood passively ready to transmit contributions voluntarily offered to him for transmittal to either Commissioner Udell or to the Republican Finance Committee of the Town of Hempstead. So far as the furnishing of cards was concerned, defendant's position was made perfectly clear and was completely described; he testified before the Grand Jury that he did not prepare cards as an integral part of the system of soliciting campaign contributions, but, rather, had cards prepared in response only to requests for salary data addressed to him and as a convenience to those employees who either

directly or through their supervisors sought, or were expected to seek, information about their salaries, so that they could better compute their voluntary one percent contributions. The defendant has not indicated either during trial or at or after he testified before the Grand Jury what additional testimony he had intended to proffer to the Grand Jury, and how it would have modified the effect of the testimony that he did give.

The suggestion has been that *Bronston* requires an inquiring attorney to pursue an evasive witness until his answer is explicitly responsive to the question asked. The defect of the questioning in *Bronston* was that the witness had very plainly not answered the second question in the sequence; he had answered a question that had not been asked, and the volunteered statement did not imply a response directed to the substance of the question asked. The first question had been whether Bronston had any bank accounts in Swiss banks at the time he was being questioned; he answered "No." The next question was "Have you ever had any Swiss bank accounts?" His answer was that his company had maintained such an account there for about six months, in Zurich. He then was asked whether any of his nominees either currently had or had ever had Swiss accounts and he answered "No." In fact Bronston had maintained a Swiss bank account which may well have continued in existence up to a date relevant to the inquiry. In *Bronston* the second answer did not amount to saying, "No, I never had such an account, but my company did." It was consistent with an answer, "Yes, both I and even my company have had accounts in Switzerland." Hence the Court concluded that the answer could not be the foundation for a charge of perjury, saying (409 U.S. at 362)

> "... we are constrained to agree with Judge Lumbard, who dissented from the judgment of the Court of Appeals, that any special problems

> arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution."

In the present case, in contrast, the defendant's answers, while discursive and circumstantial, were precisely responsive. They depicted his role; they conveyed very complete answers to the questions asked. The answers he gave could not have been deprived of their content as responsive and untrue by any words that the defendant could have added to them short of total and explicit recantation before the Grand Jury of the substance of the answers given.

Defendant gave evidence that as a result of his military service he had a service-connected disability affecting his mental condition, and it could be inferred from his courtroom performance that he is what is thought of as temperamentally high strung. However, neither the text of his Grand Jury testimony, nor his statements and testimony in court, afford ground for inferring that he failed in self-possession either before the Grand Jury or in court. The inference is that in each place he was able to say what he intended to say.

GENERAL FINDING

It is found that the defendant is guilty as charged.

Dated: Brooklyn, New York
October 1976.

U. S. D. J.

APPENDIX B — ORAL OPINION OF THE DISTRICT COURT

[Tr. pp. 57-66 (12/10/76)]

THE COURT: Well, I think it was wise and good to have made the motion and to have made it in this detail in which it has been made because I think that the questions raised are real and substantial, notwithstanding that I do think that a — first, that a hearing is unnecessary because the issues of fact are not — are not very real; and second, because I think that the papers on their face make out a total case which fails to meet the required standard.

Now, I quite agree with you that the mockery of justice standard of presentation is a standard — the days of which are numbered even in our Circuit, though they are still given a certain amount of lip service. The standard used in the 6th and 9th Circuit seem to be a good deal healthier. I am not sure that the standards used in the District of Columbia or the Court of Appeals will ever be adopted. That would seem to require that in every case the Government proved its case twice, which is a little too much.

I think my first reaction to the situation between Mr. Sutter and Mr. Graber was, of course, produced — formed and colored by what I heard from Mr. Sutter and Mr. Caden and by — Mr. Caden's contributions, of course, came to him from Mr. Sutter because he was not directly in touch with Mr. Graber during these times. I think, however, that from the time when Mr. Graber was arrested and brought into Court, I had a total suspension of judgment of who was telling the truth as between Mr. Sutter and Mr. Graber. And so by calculating and as a matter of long practice, as you can well imagine, you are not a Judge very long before you find lawyers on opposing sides of the case presenting to you diametrically opposed views of what passed between counsel. I am sure you are both familiar with

that. And you learn as a Judge that when you have those direct conflicts between people who have ongoing responsibilities to the case before you, you just don't resolve them. You can't. Because you can't resolve an issue of credibility against one of the two lawyers in the case because they are both going to continue in the case. At this point you just sort of have a failure of proof on both sides.

Now, I think that what impresses me about Mr. Graber was that his command of his own mind, his own recollection, even in the — to him, the specifically harrowing experiences of September 1, the late afternoon when he had been — I think he felt truly put upon, that he had really been victimized by some ghastly mistake, and on the following morning he did present substantially everything that has been presented here except your criticism of what was said at the side bar.

Now, I do realize that Mr. Graber did not come up to the side bar. My own practice is never to exclude clients from side bars if they want to comeup. Ordinarily they come to the first one or two and not thereafter. They find them, as they usually are, rather dry discussions. There was no exclusion of Mr. Graber from the side bar discussions in the remotest respect. I agree, those points, those things would not have been said if there was Mr. Graber's presence at the side bar. But I can only say that the only way that anyone can ever attempt an evaluation of the effect of such things is by reference to what he did before his attention was drawn to them with particularity as you have in your motion papers today. There is the balance of the conduct of the trial and the memorandum and decision. And on those I have to rest I think. I can't say anything. I do not think they disclosed any animus against Mr. Graber.

Now, I don't much care for Mr. Sutter's style as a lawyer. And I am sure many do not. Now, that is not any subtraction

from his eminence, but it's a question of style of practice and his — which I do not like, and I should say it is fairly common among busy lawyers at the criminal Bar.

I thought that two things were being done with respect to the defense of this case. One was to make sharp and clear the legal point first. And it was a twofold legal point. First, that the answers that Mr. Graber gave were not solid answers before the Grand Jury and could not as a matterof law be the foundation of a perjury indictment. Second, that as a — the transcript shows he was distraught. He is a man of a certain quality of nervous disability which doesn't impair his usefulness as a worker or anything else, but peculiarly unfits him either to be a Grand Jury witness or a trial court defendant. And that appeared, to some extent, from the transcript of the Grand Jury proceedings and in all depths at the trial, at every occasion counsel pressed on the attention of the Court the man's mental frailty — not a disabling frailty, but one peculiarly unfitting him to stand the rigors of testifying in Court, testifying before the Grand Jury. So that by the time Mr. Graber took the witness stand, I was supposed to take from his testimony what was good and discount to nervousness what was bad. That was a — the calculated part of this able lawyer's method of representing the defendant, that the seemingly derogatory remarks were attempted to doctrinate me to believe — and I think that is reflected in these memoranda — believe that he was not equal to these legal cases.

Now, I do not think that it was a happy relationship of representation. It is perfectly plain to me that Mr. Graber was acutely unhappy with it. And it was perfectly plain to me that Mr. Sutter was in one half of his mind unable to understand Mr. Graber's inability to appreciate the method of representation of Mr. Sutter that Mr. Sutter was using, and with the other side of his mind the determination to see to it that he had his way; that

he managed the litigation for one simple reason, that he thought he knew more about managing litigation than Mr. Graber did. And perhaps he does. And we have to look at the witnesses who are — as the testimony described, only an outline because as to some the affidavit says that they are not being stated in full. They rather relate to something which Mr. Sutter put into the record only as a background and by insinuation. And that is to — which is what you might call the underlying charge such as the one to which Mr. Cosenza pleaded. It was far more relevant to that. And Mr. Sutter did not during the trial omit any opportunity — and I think that, too, is reflected in the memorandum and makes it clear that Mr. Sutter wherever he could — and many of the witnesses were still — well, I don't want to use the words, "many" — witnesses were used to put into the record the idea that Mr. Graber had never threatened anybody, had never been forcible, had never in effect said, pay up or you're out of a job, or you won't get a promotion, or this, that or the next thing. That was brought out wherever he could. And wherever there is an opportunity to impeach the witness' testimony in a general way by showing a motive of some sort to testify against Mr. Graber, that was done.

And I think that within the four corners of the kind of trial that Mr. Sutter was determined to conduct and did conduct, he represented Mr. Graber very effectively.

Now, so far as the waiver of jury trial is concerned, I was somewhat surprised of Mr. Graber's continued willingness to waive the jury trial and more surprised that he didn't say, but before another Judge. I think the judgment was right because I think he has a lot of confidence that in his ability to persuade — and I think he had persuaded me on September 1st and September 2nd to a sympathetic view of him as a man.

Interestingly, if you read the pre-sentence report, you will

see what I mean. That's true. I mean he's fundamentally a sympathetic man. And you don't have to do any more than rush across the letters which have been sent in in support in connection with the pre-sentence proceedings to get some idea of the personal feeling that he is able to induce — and I think with me.

THE COURT: Now, I do not think that he was ineffectively represented. I think that he kept believing throughout that it would have been better to call a lot of witnesses who would have, in effect, tried to change the atmosphere that arose out of the Government calling the selected witnesses that it did. Because it was no secret to me that out of, I think, literally, hundreds who had been interviewed — and many more who had been interviewed in Mr. Graber's department than were called as witnesses, that the Government didn't have as many witnesses as there were people in Mr. Graber's department. Perfectly plain. But that, you see, would have been highly relevant to a different case. The case before me was this very much narrower case and one in which I think the principal objects of the trial had to be — first, to see that the witnesses didn't overspeak, to get out of them what background support of decency and decorum could be obtained, to impeach credibility for what it was worth where it could be done, and most important, to — if he was up to it — and he was — have Mr. Graber testify as to the circumstances of the Grand Jury testimony, his own background kind of person he was and his personal feelings with respect to what went on in the Grand Jury room.

Now, that made a rational trial plan. I felt that the jury having been waived my responsibility was to treat the evidence fully and the bases of my decision fully.

Do you have a time problem?

MR. CAHN: No. It is all right.

THE COURT: So that if I was wrong in this case, an appeal wouldn't be a problem, but the dice wouldn't be loaded against the man and that every legal aspect of the case that I could visualize was exposed in the opinion, was the way I had resolved it made clear, so that in the event of an appeal, if I am dead wrong, there won't be any problem in reversing me. There never is. And it is in that context that I say that I do think it was wise to have made this motion because I do think that in the way in which you have presented it here and in your papers it does fit into the decision that I rendered, so that if there are defects in the — with respect to those raised by Mr. Graber's motion, they can be immediately related to the decision in the case.

Now, however, I do not think that a case that had been made out for inadequate representation — I think that the main reason for thinking that is that the issue was solved, was so clearly and fully and in detail raised in advance of the trial, at the commencement of the trial, when the Government rested, and that each of those times a judgment was made, which I can't criticize from a legalistic point of view, although I am not really in any way in a position to do that, but which does not seem to me to be in any extent inadequate representation. I think that — I don't know. I can't guess how other lawyers would have handled them. All I can guess is having been handled the way it was, it has been — it has created this ripe opportunity for post-trial relief that may make the difference. I don't know. I don't think so. I think it should not. And for that reason I do deny the motion.

MR. CAHN: Thank you very much, your Honor. I respectfully except to your Honor's decision on the motion.

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APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of March one thousand nine hundred and seventy-seven.

Present:

HON. J. EDWARD LUMBARD

HON. WALTER R. MANSFIELD

HON. MURRAY I. GURFEIN,

Circuit Judges,

United States of America,

Plaintiff-Appellee

v.

Raymond Graber,

Defendant-Appellant

77-1006

Appeal from the United States District Court for the Eastern District of New York.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by

Arthur Heller
Deputy Clerk